No. 18785

In the

# United States Court of Appeals

## For the Ninth Circuit

INTERSTATE PLYWOOD SALES CO., a corporation,
*Appellant,*

vs.

INTERSTATE CONTAINER CORPORATION, a corporation,
*Appellee.*

# PETITION FOR REHEARING

Appeal from the United States District Court
for the Northern District of California
Southern Division
HONORABLE W. T. SWEIGERT, Judge

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## AUTHORITIES

# PETITION FOR REHEARING

TO THE HONORABLE WILLIAM E. ORR, FREDERICK G. HAMLEY and JAMES R. BROWNING, Circuit Judges:

Appellant respectfully petitions the Court for a rehearing.

The issues in this case are important, both to the parties and to other businesses engaged in marketing plywood under long-term contracts. The Court, however, has not dealt with them. It seeks instead to dispose of the case on the basis of findings which are themselves incompletely and inaccurately stated in its opinion. This petition asks that the issues be recognized and considered.

1. The Court's conclusion that the contract is unenforceable ignores material findings of the trial court and is based upon a postulated finding which the trial court did not make and which is inconsistent with its actual findings.

The trial court found (2 Op, R 102, 110-111, 119-120) and this Court recognizes (pp 4-5) that the five-mill formula was only to be used when the general market price of plywood could not otherwise be ascertained. It also found (a) that the parties intended to deal at the general market price, when it could be ascer-

tained, without reference to the formula (2 Op, R 102, 110-111, 119-120); and (b) that the parties dealt under the contract, not outside it (2 Op, R 106-107, 115).[1] The evidence was undisputed that appellant successfully marketed the bulk of defendant's production for five years.

This Court has rejected the conclusion which these findings require by reference to another and contradictory "finding" which the record shows the trial judge never made. The "finding" (p 5) "that the formula was intended to be the sole and objective binding means of fixing price under the agreement" (see R 153) was not a finding of the trial court. It was included in a set of findings prepared by defense counsel at the judge's request for findings "in accordance with the views" expressed in his second opinion (see 2 Op, R 122).[2] By order, however, the opinion, not counsel's tendered findings, stood as the findings of the court. Counsel's findings were adopted only insofar as they were consistent with it (R 149). This tendered "finding" patently contradicted the opinion, and it is astonishing to find it used as a basis for decision by this Court.

**2.** The finding that the five-mill formula was only to be used when the parties could not otherwise ascertain the general market price raised for decision the cen-

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1. *Not* "under the other contractual provisions" (p 5).
2. Cf *US v. El Paso Natural Gas Company*, (United States Supreme Court, April 6, 1964) ____US ____.

tral issue in the case, namely, whether the formula was so material that its failure from the beginning rendered the contract unenforceable. This Court's opinion, however, does not even suggest that there is such an issue—much less that it was given any consideration. The Court simply assumes that there is a rule of law which discharges a contract in such cases or that the price formula was shown to be of such central importance as to make its continued availability essential to the enforcement of the contract. Both unexpressed assumptions are wrong, and appellant has demonstrated beyond any reasonable dispute that they are wrong (App Br 54-70). We ask the Court at least to consider this critical question.

**3.** Appellant's reliance upon the practical construction doctrine related directly to the question of the materiality of the formula. In rejecting it, the Court says (p 6) that the parties did not refer to the formula because it had failed. This ignores the undisputed testimony of all of the witnesses that they did not even mention the "problem" which the Court assumes its failure created. The whole point of this testimony was that it showed there was no problem except in the mind of the trial judge. While the failure of the formula may explain why the parties did not use it, it does not explain why they did not talk about it.

The other reason assigned by the Court (p 6) for ignoring the parties' conduct is that the general market price was the only price at which they could do business, and that their dealings at that price consequently did not prove that they did not originally intend to deal at a different price calculated under the formula. This assertion merely accepts and states plaintiff's basic position—that the contract price was necessarily the general market price, and that the parties simply cannot be held to have agreed that a different price (or a contingent "formula" which would be useless if it led to a different price) was a material term of their contract.

**4.** The inadequacy of the court's analysis is further demonstrated by its approval of the trial court's "finding" that the parties "waived" the formula while performing the contract which was unenforceable from the first because the formula had failed (p 5). If the formula was "waived", it necessarily follows that it was not so material that its prior failure could discharge the contract—**and neither could its "waiver".**[3] It also follows that the outside sales were made in contravention of an existing contract (see p 7).

In short, the finding of "waiver" does not meet or

3. The trial judge considered "waiver" only as an alternative to the rule of practical construction. He did not reject the evidence of practical construction as "unconvincing" (p 6), but did so on the theory that he had to choose between the two alternatives, and plaintiff had not shown what it never asserted: that the formula was not intended to be binding at all (2 Op, R 114-117).

dispose of the basic issue, which is whether the formula was material, not whether it was waived. This fundamental inconsistency in the Court's opinion should be explained if it is to be treated as a basis for its decision.

**5.** The form of long-term contract involved in this case is widely used in the plywood industry. Pricing clauses referring to the price level of neighboring mills are a constant feature of such contracts. It will, we suggest, come as a distinct surprise to those who finance mills against future production and commit themselves for millions of board feet over a period of years that the validity of their contracts is dependent upon the continued operation and constant availability of published price schedules of all of the mills named in the contract. The decision of the Court ignores the established practice of important elements of the business community, and we ask the Court to reconsider the issues involved and the economic consequences of what it has done.

The petition should be allowed.

Respectfully submitted,

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## CERTIFICATE

I certify that in my judgment the foregoing Petition for Rehearing is well founded, and the same is not interposed for delay.

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*of Attorneys for Appellant*